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No. 99-680

In The

Supreme Court of the United States

October Term, 1999

Maria Hsia,

Petitioner,

v.

United States of America

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

In our Petition, we established two substantial bases upon which the Petition should be granted. First, the D.C. Circuit's decision on the level of intent that must be proved in a "causing false statements" prosecution based on political activity regulated by the Federal Election Campaign Act[1] ("FECA") directly conflicts with the Third Circuit's decision in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), and that conflict can only be resolved by this Court. Second, Congressional intent and First Amendment concerns require that FECA violations be enforced exclusively pursuant to the carefully calibrated and reticulated FECA statute.

In its Brief in Opposition ("Opp'n"), the government concedes the square split on the important issue of intent and offers no argument as to how the interests of justice would be served by allowing this irreconcilable division in the Circuits to continue. The government also acknowledges that it too viewed FECA as the sole means of addressing FECA violations for the first twelve years of the statute's existence, offering no plausible basis for its radical change of position.

Clearly, it is in the interest of sound and orderly judicial process to resolve the acknowledged conflict as well as to address the threshold question whether FECA's precisely drawn First Amendment-sensitive provisions were intended by Congress as the only means to enforce FECA violations. The Petition should therefore be granted.

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1 2 U.S.C. §§ 431-455.

THE CIRCUITS ARE SQUARELY DIVIDED OVER THE PROPER LEVEL OF INTENT IN A FECA-BASED "CAUSING FALSE STATEMENTS" PROSECUTION

There is a direct and irreconcilable conflict between the decisions of the District of Columbia Circuit, in this case, and the Third Circuit, in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), on the proper construction of 18 U.S.C. § 2(b)'s "willfulness" in a "causing false statements" prosecution based on a campaign finance violation. The District of Columbia Circuit's ruling that knowledge of unlawfulness is not required is contrary to *Ratzlaf v. United States*, 510 U.S. 135 (1994), in that it risks unfairly ensnaring individuals in criminal liability for unknowing violations of regulatory provisions. This concern is heightened in the First Amendment-sensitive FECA context where Congress has made clear its view that proof of knowledge of unlawfulness is required for any criminal prosecution.

Although the government acknowledges the split in the Circuits (*see* Opp'n at 11), it seeks to evade review through two stratagems. First, it argues that because the procedural posture is interlocutory, review is premature and the case should proceed to trial for factual and legal development. Opp'n at 7. The Court, however, would not be assisted by a "concrete factual setting" or "the benefit of specific instructions to review." *Id.* As the government recognizes, the issue is a *legal* one that the District of Columbia Circuit has fully decided;[2] factual development at

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[2] Because venue exists in the District of Columbia for all charges of "causing false statements" in FEC reports, the government is free to bring all future charges here, making delay even more inappropriate.

trial would neither change nor inform the matter.[3] This Court has granted certiorari prior to trial in the criminal context where, as here, the split is clear and would not be elucidated by further consideration. *See, e.g., Bates v. United States,* 118 S. Ct. 285, 289 (1997). [4]

Second, to minimize the existence of the fully developed conflict between the Circuits and to escape the unconstitutional vice of these prosecutions -- that the innocent may be ensnared -- the government takes the preposterous position that the practical difference flowing from the conflict is insubstantial. Opp'n at 12-13. To characterize the difference in the views of the conflicting courts of appeals -- proof of knowledge of unlawfulness (the Third Circuit) versus no such requirement (the District of Columbia Circuit) -- as insignificant is belied by the fact that the government vigorously argued for the principle of law adopted by the District of Columbia Circuit. The critical nature of the difference in the two distinct views is illustrated by the number of times this Court has been faced with the very issue presented here, in other contexts. *See, e.g., Ratzlaf,* 510 U.S. 135; *Bryan v. United States*, 524 U.S. 184 (1998); *Cheek v. United States*, 498 U.S. 192 (1991). The

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[3] Nor should the imminence of Ms. Hsia's trial have any effect on whether the Court grants the Petition; the government has agreed that the trial will be indefinitely postponed should this Court grant the writ of certiorari.

[4] Indeed, in *Bates*, the Court granted certiorari in the same procedural posture to address a similar "level of intent" issue. After the district court dismissed the indictment, the Seventh Circuit reversed and reinstated the prosecution. Because "[t]he Seventh Circuit's decision conflicts with the Eleventh Circuit's," this Court "granted certiorari to resolve this conflict" even though the government objected that the court could address the split after trial and conviction. 118 S. Ct. at 289.

government's attempt to evade review by running from the consequences of its own position is understandable but ultimately unavailing.

Only by making this spurious claim is the government plausibly able to assert that there is no possibility that criminal penalties will be imposed on the basis of innocent conduct. Opp'n at 14. There are numerous wholly innocent explanations for a "contribution in the name of another" which, in the government's view, is precisely the activity that "causes" the false statement. *See, e.g.*, Pet. at 14 -16; *Curran*, 20 F.3d at 563; *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J.). Significantly, the activity regulated by FECA is political activity many individuals have no reason to believe is regulated or prohibited; "[i]n fact, First Amendment constraints presuppose the opposite view," that is, that the activity is protected from government burden or infringement. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994).

As the Third Circuit has held, a "causing false statements" prosecution in the federal election context falls squarely within this Court's holdings that where a technical regulatory statute carries with it the risk that the innocent may be charged, the government must show that the defendant knew her conduct was made illegal by the statutes in question. *See, e.g., Ratzlaf*, 510 U.S. at 137; *Cheek*, 498 U.S. at 201-02.[5] Moreover, defining "willfully" to mean

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[5] The Opposition interprets *Ratzlaf* as the sole result of the particular statutory language there. Opp'n at 9. The statutory language is no less compelling here. Section 2(b) was amended in 1951 by adding "willfully" to modify "causes." *See United States v. Leppo*, 177 F.3d 93, 95 n.2 (1st Cir. 1999). Section 1001, too, requires proof of "willful" activity. And, FECA itself requires "knowing and willful" conduct, defined by Congress to mean knowledge of the law. The government's

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knowledge of unlawfulness is consistent with the Court's recent opinion in *Bryan*, 524 U.S. at 191, and, contrary to the government's position, is not inconsistent with *United States v. Yermian*, 468 U.S. 63 (1984).

CONGRESS INTENDED FECA TO BE THE EXCLUSIVE MEANS OF ENFORCING FECA COMPLIANCE

Resolution of the threshold question whether FECA is the exclusive means of enforcing FECA compliance would resolve the stark split between the D.C. Circuit and the Third Circuit. To avert review of this fundamental constitutional and statutory issue, the government ignores the anomalous results engendered by the use of the "causing false statements" statutes and fails even to consider the common sense argument that the statutes can be read together as Congress intended, focusing instead on what it calls "implied repeal."[6]

The government does not dispute that for twelve years it too interpreted FECA as the exclusive means of enforcing

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interpretation would render all three statutory provisions nugatory. *See* Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae In Support of the Petition at 3-7 (Dec. 1999).

6 Although Petitioner has not made an implied repeal argument here, the government frames its response entirely in those terms. Even viewed in that framework, however, the "causing false statements" statutes, which were not enacted with First Amendment concerns in mind, are clearly repugnant to FECA's "fine balance of interests . . . deliberately struck by Congress" in its "first-amendment-sensitive" provisions. *Galliano v. United States Postal Service*, 836 F.2d 1362, 1370 (D.C. Cir. 1988).

FECA. While it characterizes its abrupt flip-flop as "cautious consideration, guided by accumulated experience and relevant legal developments" (Opp'n at 14 n.3), a more accurate description of why the government suddenly began prosecuting FECA violations under 18 U.S.C. §§ 2(b) and 1001 is found in its own Manual where it recognized that FECA has "many features that render it difficult to use," including FECA's intent requirement, the monetary jurisdictional floor, "complex and confusing venue rules," and the "special three-year statue of limitations." U.S. Department of Justice 1988 Manual, *Federal Prosecution of Election Offenses* 73-75 (5th ed. 1988). In other words, the government decided to use broad, general felony statutes to prosecute FECA violations because it disapproved of the statute Congress enacted as too burdensome.

The government nowhere addresses the bizarre and anomalous result of its position, that a felony "causing false statements" prosecution allows it to meet fewer and less stringent requirements than a FECA misdemeanor charge.[7] Indeed, compelling and irrefutable evidence that Congress intended that political activity regulated by FECA would *not* be subjected to prosecutions under Section 1001 can be found in FECA itself: Congress expressly provided that Section 1001 applies to complaints to the FEC.[8] Had it intended the false statements statute to apply generally to matters regulated by FECA, it would not have made this

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7 Even an FEC civil remedy involving the same conduct would have a higher intent standard than that approved, at the government's behest, by the D.C. Circuit.

8 *See* 2 U.S.C. § 437g(a)(1) ("Any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission. . . . under penalty of perjury and subject to the provisions of section 1001 of Title 18.").

explicit declaration, a statutory provision the government's position renders nonsensical.

Finally, the government begs the ultimate question, dismissing the cases which support our view with the unsupported *ipse dixit* assertion that "there is no question that the false statements statute covers the false reports alleged in this case." Opp'n at 17. That is precisely the question presented in the Petition, one which the Court should resolve in the interest of the rational, orderly administration of FECA, the finely tuned statute intended by Congress to comprehensively regulate campaign financing.[9]

THE FIRST AMENDMENT REQUIRES PROMPT REVIEW OF THE SIGNIFICANT QUESTIONS RAISED BY THE PETITION

In arguing that the First Amendment is irrelevant because it does not protect "false statements," the government attempts to sidestep the significant constitutional issue before this Court. The First Amendment not only supports both bases for granting certiorari, it also requires the Court to address these issues now, rather than post-trial, to avoid the chill to speech which occurs when vague or broad criminal laws are used in an area of First Amendment sensitivity. [10]

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9 The government's reliance on *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990) and *Curran*, 20 F.3d 560, is misplaced: neither court of appeals considered Congressional intent in light of FECA's comprehensive First Amendment-based provisions. Indeed, neither so much as referred to as *Buckley v. Valeo*.

10 As the government well knows, petitioner has never claimed that the political activity alleged is "immunized" by the First Amendment. Opp'n at 20.

Contrary to the government's contention, it is settled that the mere allegation of "falsity" does not cause the First Amendment, or First Amendment concerns, to disappear. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in response to the Alabama Supreme Court's view that "[t]he First Amendment . . . does not protect libelous publications" (*id.* at 264), the Court made clear that it was "compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law." *Id.* at 269. Instead, charges "must be measured by standards that satisfy the First Amendment." *Id.*

As hard as the government tries, it cannot escape this Court's holding that FECA "operate[s] in an area . . . of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. Because it is a ban on the only form of political contributions that would allow contributors to remain anonymous, the prohibition on "contributions in the name of another" "seriously infringe[s] on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The court has recognized that "public disclosure of contributions to candidates and political parties" burdens the First Amendment because it "will deter some individuals who otherwise might contribute." *Id.* at 68. As Chief Justice Burger observed in *Buckley*, "[s]ecrecy, like privacy, is not per se criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society." *Id.* at 237. [11]

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[11] The then Chief Justice emphasized that "forcing the disclosure of contributions that are the prime support of new, unpopular, or unfashionable political causes" will plainly have a deterrent effect on potential contributors (*id.* at 240-41) and pointed out several examples of contributions that FECA might deter. *Id.* at 237. The examples provide further evidence that there is nothing inherently evil about a

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Although *Buckley* and its progeny have allowed some modest regulation of political activity, particularly contributions to candidates, that activity does not thereby lose all First Amendment protections. Surely the government does not seriously contend that any regulation of campaign financing, no matter how vague, broad or inhibitory, is permissible. Rather, the activity legitimately may be regulated *only so long as* the particular regulation addresses a compelling governmental interest and regulates as narrowly as possible to meet that interest. Thus, one who makes a "contribution in the name of another," perhaps to avoid a contribution limit, perhaps to avoid a spouse's disapproval, perhaps as a matter of religious practice, is engaging in protected political activity that may be regulated only by a narrowly drawn statute justified by a compelling governmental interest.

"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Otherwise, "citizens [may] 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Accordingly, concerns of irreparable injury to precious First Amendment rights[12] demand the Court

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"contribution in the name of another" which may be undertaken to avoid disclosure, and which, unless an individual understands the "causing false statements" statute's prohibition, will ensnare the innocent.

12 The risk of irreparable injury to First Amendment rights renders post-trial appeal "inadequate." *See In re Halkin*, 598 F.2d 176, 199 (D.C. Cir. 1979); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Fort Wayne Books v. Indiana*, 489 U.S. 46, 54-57 (1989).

review these issues now, before further harm, further chill to protected speech, association and belief, occurs.[13]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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13 The government's view that contributors are not chilled because "legitimate contributors" will not be prosecuted fails to comprehend the nature of this Court's First Amendment jurisprudence. *See* Opp'n at 18. This argument would define away all "chill," no matter how vague or overbroad the law in question.